SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2023 0047

JACOB BURKE Applicant

v

THE KING Respondent

JUDGES:	BEACH and WALKER JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	25 September 2023
DATE OF JUDGMENT:	25 September 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 233
JUDGMENT APPEALED FROM:	[2023] VCC 1355 (Judge Lacava)

CRIMINAL LAW – Sentence – Appeal – Application for extension of time within which to seek leave to appeal – Theft (37 charges), attempting to obtain financial advantage by deception (4 charges), obtaining property by deception (2 charges), handling stolen goods (4 charges), burglary (two charges), theft of firearm, damaging property, obtaining financial advantage by deception, recklessly exposing emergency worker to risk by driving and 19 related summary offences – Total effective sentence 5 years and 6 months, with non-parole period of 3 years and 4 months – No reasonable prospect that total effective sentence would be reduced – No reasonable prospect that less severe non-parole period would be imposed – Application for leave to appeal having no prospect of success – Futile to grant extension of time – Application for extension of time refused.

Criminal Procedure Act 2009, s 280(1), *Sentencing Act 1991*, ss 5(2H), 16(3C) and (3D).

Counsel

Applicant:	Mr J O'Connor
Respondent:	Mr P Bourke KC

Solicitors

Applicant:	Victoria Legal Aid
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

BEACH JA
WALKER JA:

1 The applicant pleaded guilty in the County Court to 37 charges of theft[1] (charges 1–11, 14–18, 22, 23, 26, 28–30, 34–37, 39, 41–43 and 45–51); four charges of attempting to obtain a financial advantage by deception[2] (charges 12, 38, 40 and 44); two charges of obtaining property by deception[3] (charges 13 and 20); four charges of handling stolen goods[4] (charges 19, 21, 27 and 52); two charges of burglary[5] (charges 24 and 32); one charge of theft of a firearm[6] (charge 25); one charge of damaging property[7] (charge 31); one charge of obtaining a financial advantage by deception[8] (charge 33); and one charge of the aggravated offence of recklessly exposing an emergency worker to risk by driving[9] (charge 53).

2 Charges 25 and 53 were rolled up charges. Charge 53 was also a category 2 offence within the meaning of s 3(1) of the *Sentencing Act 1991*. Being a category 2 offence, s 5(2H) of the *Sentencing Act* obliged the sentencing judge to impose a period of imprisonment on that charge without a community correction order unless one of the exceptions in s 5(2H)(a)–(e) was established.

3 At the same time as pleading guilty to the 53 charges to which we have referred, the applicant pleaded guilty to 19 related summary offences. These comprised 16 charges of committing an indictable offence whilst on bail[10] (related summary offences 5, 34, 49, 62, 66, 72, 80, 82, 94, 129, 137, 150, 156, 160, 189 and 213); one charge of driving whilst disqualified[11] (related summary offence 12); one charge of driving a motor vehicle in a manner dangerous[12] (related summary offence 125); and one charge of entering a private place without authority[13] (related summary offence 154).

4 On 24 August 2022, following a plea hearing on 8 August 2022, the applicant was sentenced as follows:

Charge	Offence	Max Penalty	Sentence	Cumulation
1	Theft	10 years	6 months	3 months
2	Theft	10 years	1 month	-
3	Theft	10	1	-

1 Contrary to s 74(1) of the *Crimes Act 1958*.
2 Contrary to ss 321M and 82(1) of the *Crimes Act 1958*.
3 Contrary to s 81 of the *Crimes Act 1958*.
4 Contrary to s 88 of the *Crimes Act 1958*.
5 Contrary to s 76 of the *Crimes Act 1958*.
6 Contrary to s 74AA(1) of the *Crimes Act 1958.*
7 Contrary to s 197(1) of the *Crimes Act 1958*.
8 Contrary to s 82 of the *Crimes Act 1958*.
9 Contrary to s 317AF of the *Crimes Act 1958*.
10 Contrary to s 30B of the *Bail Act 1977*.
11 Contrary to s 30(1) of the *Road Safety Act 1986*.
12 Contrary to s 64(1) of the *Road Safety Act 1986*.
13 Contrary to s 9(1)(e) of the *Summary Offences Act 1966*.

		years	month	
4	Theft	10 years	6 months	-
5	Theft	10 years	1 month	-
6	Theft	10 years	12 months	6 months
7	Theft	10 years	1 month	-
8	Theft	10 years	1 month	-
9	Theft	10 years	1 month	-
10	Theft	10 years	1 month	-
11	Theft	10 years	1 month	-
12	Attempting to obtain a financial advantage by deception	5 years	3 months	-
13	Obtaining property by deception	10 years	3 months	-
14	Theft	10 years	6 months	-
15	Theft	10 years	6 months	-
16	Theft	10 years	6 months	-
17	Theft	10 years	1 month	-
18	Theft	10 years	1 month	-
19	Handling stolen goods	15 years	1 month	-
20	Obtaining property by deception	10 years	1 month	-
21	Handling stolen goods	15 years	1 month	-
22	Theft	10 years	6 months	-
23	Theft	10	1	-

		years	month	
24	Burglary	10 years	12 months	3 months
25	Theft of a firearm	15 years	18 months	BASE
26	Theft	10 years	1 month	-
27	Handling stolen goods	15 years	3 months	-
28	Theft	10 years	1 month	-
29	Theft	10 years	1 month	-
30	Theft	10 years	1 month	-
31	Intentionally damaging property	10 years	3 months	-
32	Burglary	10 years	12 months	3 months
33	Obtaining a financial advantage by deception	10 years	3 months	-
34	Theft	10 years	1 month	-
35	Theft	10 years	1 month	-
36	Theft	10 years	3 months	-
37	Theft	10 years	3 months	-
38	Attempting to obtain a financial advantage by deception	10 years	1 month	-
39	Theft	10 years	1 month	-
40	Attempting to obtain a financial advantage by deception	10 years	12 months	6 months
41	Theft	10 years	12 months	6 months
42	Theft	10 years	1 month	-
43	Theft	10	1	-

		years	month	
44	Attempting to obtain a financial advantage by deception	10 years	12 months	6 months
45	Theft	10 years	6 months	-
46	Theft	10 years	3 months	-
47	Theft	10 years	2 months	-
48	Theft	10 years	1 month	-
49	Theft	10 years	3 months	-
50	Theft	10 years	6 months	-
51	Theft	10 years	1 month	-
52	Handling stolen goods	15 years	1 month	-
53	Aggravated reckless exposure of an emergency worker to risk by driving	10 years	12 months	12 months
Related Summary Offences				
5	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
12	Drive whilst disqualified	2 years	3 months	-
34	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
49	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
62	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
66	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
72	Commit indictable offence	3	3	-

	whilst on bail	months	months aggregate	
80	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
82	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
94	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
125	Drive in a manner dangerous	2 years	6 months	3 months
129	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
137	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
150	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
154	Without authorisation, enter a private place	6 months	1 month	-
156	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
160	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
189	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
213	Commit indictable offence whilst on bail	3 months	3 months aggregate	-
Total Effective Sentence:		5 years and 6 months		
Non-Parole Period:		3 years and 4 months		
Pre-sentence Detention Declared:		605 days		
Section 6AAA Statement:		8 years, with a non-parole period of 6 years and 9 months		

5 On 31 March 2023, some six months out of time, the applicant filed an application for an extension of time for the filing of an application for leave to appeal against sentence. In his notice of application for leave to appeal against sentence, the applicant set out his proposed grounds of appeal as follows:

> 1. The sentencing judge erred by failing to give any weight to the delay between the commission of the offences and sentence.
>
> 2. The sentencing judge erred in finding that 'this kind of offending is so prevalent' and imposing a more severe sentence on account of that finding in circumstances where:
>
> (a) the applicant was not afforded an opportunity to make submissions with respect to the finding; and
>
> (b) there was no reliable foundation for the finding.
>
> 3. The orders for cumulation made on each of charges 1, 6, 24, 32, 40, 41, 44, 53 and related summary charge 125, the total effective sentence, and the non-parole period are manifestly excessive having regard, in particular, to:
>
> (a) the weight required to be given to totality; and
>
> (b) the applicant's pleas of guilty.

6 The application for an extension of time within which to seek leave to appeal against sentence requires consideration of the merits of the applicant's proposed appeal and the applicant's reasons for not filing his application for leave to appeal within the prescribed time.[14] While the respondent accepted that the applicant's delay was largely attributable to attempts to secure funding through Victoria Legal Aid, it submitted that none of the applicant's proposed grounds of appeal enjoy sufficient prospects of success to justify an extension of time being granted.

7 For the reasons that follow, the applicant's application for an extension of time will be refused.

Circumstances of the offending

8 The offending for which the applicant fell to be sentenced occurred between 25 July 2020 and 23 December 2020.

9 On 16 September 2020, the applicant was bailed in respect of unrelated offending. The indictable offences he committed thereafter were committed while he was on that bail and gave rise to the 16 charges of committing an indictable offence whilst on bail to which we have already referred.

10 On 14 October 2020, the applicant's driver's licence was cancelled and he was disqualified from driving. The driving the applicant was observed to engage in (as set out below) between

[14] See *Kentwell v The Queen* (2014) 252 CLR 601, 613–14 [29]–[33]; *Derwish v The Queen* [2016] VSCA 72, [55]–[57]; *Madafferi v The Queen* [2017] VSCA 302, [11]; *Chen v The Queen* [2017] VSCA 335, [22]–[23]; *Tewaka v The King* [2022] VSCA 275, [3].

23 October 2020 and 23 December 2020 was the driving which gave rise to related summary offence 12.

11 We turn now to the circumstances of the other charges to which the applicant pleaded guilty.

25 July 2020

12 At approximately 6.00 am on 25 July 2020, Michael Berkley went to the front of his home in Dromana to find his 1997 Jaguar XF sedan, along with his wallet and keys inside, had been stolen (charges 1 and 2 – theft). At 12.21 pm that day, the applicant was observed driving the car into a Caltex Service station in Baxter where he filled it up with $44 worth of petrol before driving away without attempting to pay (charge 3 – theft). The vehicle was recovered the next day in Dromana.

12 October 2020

13 At approximately 6.25 am on 12 October 2020, Heath Wittmer went to the front of his home in Safety Beach to find his 2003 Ford Falcon sedan had been stolen (charge 4 – theft). At 1.15 pm that day, the applicant was observed driving the car into a Caltex Service station in Moorooduc where he filled it up with $62 worth of petrol before driving away without attempting to pay (charge 5 – theft). The vehicle was eventually located in Dromana and returned to Mr Wittmer.

14 23 October 2020

15 On 23 October 2020, at approximately 2.00 am the applicant stole Mr Wittmer's car for a second time (charge 6 – theft). At 6.09 am that day, the applicant was observed driving the car into a Caltex Service station in Romsey where he filled it up with $59 worth of petrol before driving away without attempting to pay (charge 7 – theft). The car was not recovered a second time.

20 November 2020

16 In the early hours of 20 November 2020, the applicant committed a number of thefts from motor vehicles in the Gisborne area:

(a) a Nissan Navara belonging to Brandon Crawford was broken into, and Mr Crawford's wallet containing cards and personal identification were stolen (charge 8 – theft);

(b) a Toyota Hilux belonging to Murray MacDougall was broken into, and Mr MacDougall's bank card, driver licence, and other identification cards, together with a pair Nike shoes, were stolen (charge 9 – theft);

(c) a Kia Rio belonging to Nikita Bearman was broken into, and loose change from inside the vehicle was stolen (charge 10 – theft); and

(d) a Volvo sedan belonging to Louise Pope was broken into, and loose change and a security card belonging to Ms Pope were stolen (charge 11 – theft).

17 At 5.55 am later that day, Mr MacDougall received a text message from his bank detailing suspicious activity on his stolen bank card. The applicant had attempted to make three transactions totalling $603.38. The bank was able to cancel the payments prior to the

transactions being completed (charge 12 – attempting to obtain a financial advantage by deception).

18 24 November 2020

19 Four days later, on 24 November 2020, the applicant used Mr MacDougall's driver's licence as identification to sell an iPhone on Facebook Marketplace. Anmol Sandhu attempted to purchase the iPhone from the applicant, transferring $450 as payment for the phone. Once payment was received, the applicant stopped responding to messages from Mr Sandhu. The applicant never sent any phone to Mr Sandhu, and it was accepted on the plea that no phone ever existed. The money was never returned (charge 13 – obtaining property by deception).

20 30 November 2020

21 At some point between 30 November 2020 and 7 December 2020, the applicant attended the home of James Warwick in Carlsruhe. The applicant stole Mr Warwick's brother-in-law's 2003 Holden Commodore station wagon (charge 14 – theft).

3 December 2020

22 In the early hours of 3 December 2020, the applicant committed a number of thefts in the Sunbury area:

(a) Michael Milner's Mercedes-Benz Vito was stolen from the front of his home and not subsequently recovered (charge 15 – theft);

(b) a SsangYong station wagon belonging to Subash Chandra was broken into, and coins and sunglasses were stolen (charge 16 – theft);

(c) a Toyota Aurion belonging to Dilnawaz Chawla was broken into, and coins were stolen (charge 17 – theft); and

(d) a Toyota Estima station wagon belonging to Maria Segundo was broken into, and coins and gift cards were stolen (charge 18 – theft).

23 Later that day, the applicant contacted Baillie Tatt offering to sell a nail gun valued at $1,000 for $200. The applicant knew or believed the nail gun had been stolen (charge 19 – handling stolen goods).

24 The applicant drove Mr Milner's stolen Mercedes to meet Mr Tatt, who initially declined to purchase the nail gun, but later changed his mind. The applicant returned to Mr Tatt's work site, where Mr Tatt asked him to show some identification. The applicant showed Mr Tatt a picture of a Victorian driver's licence in the name of Gregory Afamasaga (charge 21 – handling stolen goods), which he had altered to put his face onto the card. Mr Tatt purchased the nail gun for $50, and then reported the matter to the police (charge 20 – obtaining property by deception).

6 December 2020

25 On 6 December 2020, at approximately 8.00 pm Milad Issi returned to the car park where he had parked his blue Holden Commodore station wagon four hours earlier, to find it had been stolen (charge 22 – theft). Mr Issi conceded to police that he believed he may have dropped

the car keys when he exited the vehicle; this does not, of course, excuse the theft.

8 December 2020

26 On 8 December 2020, at approximately 5.05 am, the applicant was seen driving Mr Issi's stolen Holden Commodore to a Caltex Service station in Sunbury where he filled the car with $50 worth of petrol before driving off without making any attempt to pay (charge 23 – theft). Police observed the stolen vehicle at 4.59 pm that day driving erratically along the Calder Freeway. They lost sight of the vehicle in Kyneton. The applicant was observed at 5.19 pm on CCTV entering a Taradale Metro Service Station where he filled the car with $9.11 worth of petrol before leaving without paying (charge 26 – theft).

27 Shortly after, the applicant was again spotted by police who deployed stop sticks near Saleyards Road. The applicant drove over the sticks and continued on with a deflated front right tyre. Due to the marks left by the deflated wheel on the road, the police were able to follow the applicant and located the vehicle abandoned on Pipers Creek Road. Inside the vehicle, police found various items including a ukulele, a padlock, seven miscellaneous keys, payslips in the name of William Newman, assorted tools, a tackle box, gardening gloves, cigarettes, a lighter, a glass-breaking pen, a torch, a dart case, a mobile speaker, a power bank, assorted headphones, three pairs of sunglasses, and assorted bags (charge 27 – handling stolen goods).

28 At approximately 5.59 pm, the applicant was observed walking towards the rear shed of Gregory Clinnick's home in Carlsruhe. The applicant took a pole and smashed a hole in a sliding door before reaching his arm inside to gain access to the house. He then walked around the house for approximately 45 minutes, taking ice creams from the fridge and watching TV (charge 24 – burglary). He subsequently located the CCTV hard drive and turned the CCTV off. Numerous electrical power tools, pottery, art pieces and personal items were stolen by the applicant, as well as 250 rounds of ammunition. The applicant went on to break through a plaster wall on the eastern end of the house to gain access to a firearm safe and force it open. He was able to steal three firearms belonging to Mr Clinnick (rolled up charge 25 – theft of firearms). None of the firearms have been recovered by the police.

9 December 2020

29 On 9 December 2020, at approximately 7.00 am, the applicant was approached by Drew Kibble whilst he was walking around the carport of his mother's home. After a short exchange, the applicant left the property in the Holden Commodore believed to be the vehicle previously stolen from Mr Warrick. Later Mr Kibble checked the carport and was unable to locate the keys to his mother's Toyota Landcruiser (charge 30 – theft).

30 Later that day, at approximately 9.17 am, the applicant drove to the Caltex Service Station in Sunbury in Mr Warwick's stolen Holden Commodore where he filled the car with $80 worth of petrol before driving off without making any attempt to pay (charge 29 – theft).

10 December 2020

31 The following day, on 10 December 2020 at approximately 12.30 am, police observed a blue VX Commodore exit the BP Service Station in Sunbury. The applicant was caught on the service station's CCTV footage. Police were unsuccessful in their attempt to intercept the vehicle. The vehicle bore registration plates which had been stolen the day before from a

vehicle owned by Ronald Groves (charge 28 – theft).

32 Five hours later, the applicant was observed by Kai O'Callaghan returning to Mr Kibble's property where he also noticed that the gates to the property had been damaged, and that the Commodore belonging to Mr Warwick was stopped further down the driveway (charge 31 – intentionally damaging property; and related summary charge 154 – entering a private place without authorisation).

33 11 December 2020

34 On 11 December 2020, Kathryn Portelli observed a blue utility vehicle drive up the home of Peter Shuey in Carlsruhe at approximately 3.26 pm. Ms Portelli telephoned Mr Shuey, who told her that nobody should have been home at the time, so Ms Portelli subsequently contacted the police. Police attended and located a blue Ford Falcon with Mr Shuey's trailer attached to the vehicle. A number of items from inside the address were loaded into the trailer, including a diesel generator, power tools, a chainsaw and a bow and arrow (charge 32 – burglary).

35 Police were unable to locate anyone inside the address. The agreed summary of offending stated that the police believed the applicant had observed police arriving at the residence and fled.

15 December 2020

36 On 15 December 2020, the applicant set up a new mobile phone number with Vodafone, again using the identification of Gregory Afamasaga to do so. The applicant was ultimately arrested in possession of a mobile phone with the number attached to this account (charge 33 – obtaining a financial advantage by deception).

16 December 2020

37 In the early hours of 16 December 2020, the applicant committed a number of thefts in Mernda area:

(a) a headtorch was stolen from a vehicle belonging to Rhonda Walsh (charge 35 – theft);

(b) a laptop, fuel card, and iPad were stolen from a vehicle belonging to Peter Tevega (charge 36 – theft); and

(c) a wallet containing $185 of cash, personal credit and debit cards, driver's licence, and an iPad and pair of sunglasses were stolen from Krystal Dennis (charge 37 – theft).

38 On the same morning, the applicant also stole a purse belonging to Natalie Gioffre from her Kia Rio parked outside her address in Craigieburn (charge 34 – theft).

39 At approximately 7.47 am, the applicant was picked up by a Silvertop taxi in Mernda. The applicant attempted to use two of the credit cards he stole from Ms Dennis to pay the fare of $46.62, but both cards were declined (charge 38 – attempting to obtain financial advantage by deception). The applicant then paid the driver in cash.

40 17 December 2020

41 On 17 December 2020, the applicant broke into a Toyota Hilux belonging to Keerithi

Pothuwila and stole Mr Pothuwila's driver's licence (charge 39 – theft). Using Mr Pothuwila's personal details, the applicant then created an email account in Mr Pothuwila's name. He then applied to Heritage Bank for an online loan of $49,000. The application was stopped by police (charge 40 – attempting to obtain a financial advantage by deception).

42 18 December 2020

43 On 18 December 2020, the applicant contacted Sunbury Ford to arrange a test drive of a Ford Ranger utility. He attended at the dealership at approximately 4.00 pm and produced the licence belonging to Gregory Afamasaga. He then drove the vehicle under the guise of a test drive, but never returned the vehicle. The entire incident was captured on CCTV (charge 41 – theft). At approximately 6.53 pm, he entered the Caltex Service Station in Craigieburn in the stolen Ford Ranger. He filled the vehicle up with $59 worth of petrol and made no attempt to pay before leaving (charge 42 – theft).

44 19 December 2020

45 At approximately 6.00 am on 19 December 2020, the applicant entered the Caltex Service Station in Kalkallo in the stolen Ford Ranger. He filled it up with $64 worth of petrol and made no attempt to pay before leaving (charge 43 – theft). On the same day, he utilised Ms Dennis' personal cards in an attempt to apply for a personal loan of $20,000 from a credit facility named Wisr. The applicant had opened a Gmail account with the password of Jacobb15 in order to make the application. Other enquiries made by the applicant to other credit companies under the name Krystal Dennis were located in the Gmail account created by him (charge 44 – attempting to obtain a financial advantage by deception).

22 December 2020

46 On 22 December 2020, the applicant committed a number of thefts in Roxburgh Park area:

(a) a Mercedes Sprinter van owned by Abdelghani Zermani was broken into, and a set of car keys and a mobile phone belonging to Mr Zermani were stolen (charge 46 – theft);

(b) a Toyota Corolla belonging to Ahmed Mukhtar was broken into. Personal documentation including VicRoads transfer papers, a receipt, an ANZ bank card and aftershave belonging to Mr Mukhtar was stolen (charge 47 – theft);

(c) a Nissan Qashqai belonging to Jessica Leblache was broken into, and her wallet, personal cards and other documents were stolen (charge 48 – theft); and

(d) a Holden Astra belonging to Jacqueline Rabaa was broken into, and prescription medication packets, bank documents and assorted membership cards belonging to Ms Rabaa were stolen. (charge 49 – theft).

47 Later that day, Lynda Hammond parked her Ford Falcon sedan outside her home in Craigieburn. The vehicle was left running with the keys in the ignition. Ms Hammond went inside briefly, before returning to find her vehicle had been stolen. The vehicle was recovered two days later parked in Lancefield. The applicant's mobile phone had a series of videos showing him driving Ms Hammond's stolen vehicle (charge 45 – theft). Ms Leblache's stolen personal items were also located in the vehicle.

48 23 December 2020

49 In the early hours of the morning of 23 December 2020, the applicant stole a Volkswagen Amarok belonging to Shane Walters from the driveway of his home in Lancefield (charge 50 – theft). Later that morning, at approximately 4.45 am, the applicant was observed driving the Amarok into the Coles Express Service Station in Sunbury. He filled the vehicle up with $44 of petrol and made no attempt to pay before leaving (charge 51 – theft).

50 Police began to conduct patrols for the applicant later that day. At approximately 1.45 pm, police observed the stolen Amarok travelling south on Kerrie Road. They gestured for the applicant to pull over, with one car taking up a position behind the Amarok to stop it from getting away. The applicant then drove towards the police vehicle, ramming the front of the car causing damage. In doing so, he exposed two emergency workers 'to risk by driving' (Senior Constable Jacqueline Lovett and Senior Constable Barry Skehan). The applicant then attempted to drive around the police vehicle, causing scrape marks down the side of the vehicle. He drove past the police vehicle before reversing back and hitting the rear again (rolled up charge 53 – aggravated reckless exposure of an emergency worker to risk by driving).

51 The applicant drove off at a fast rate of speed into private farms, driving through multiple fences. He was pursued for approximately one kilometre before he mounted an embankment and collided head-on with a tree. He then got out of the vehicle and ran across a nearby farm. Police pursued the applicant, and he was arrested (related summary charge 125 – driving in a manner dangerous).

52 Items relating to the Roxburgh Park thefts, the subject of charges 45 to 48, were located inside the Amarok, along with Mr Pothuwila's driver's licence and handwritten notes in relation to the loan application to Heritage Bank. A large number of stolen letters and post items from 11 separate victims were also located inside the vehicle (charge 52 – handling stolen goods).

Applicant's background

53 The applicant was 25 at the time of his offending, and 27 at the time of sentence. His parents separated when he was three. He then continued to live with his mother, but maintained a good relationship with his father who died when he was 11. When he was 12, the applicant went to live with a friend of his family. He began using cannabis at the age of 13, and started using methylamphetamine at the age of 14.

54 At the time of sentencing, the applicant had an 8-year-old step-daughter and a 5-year-old daughter, both of whom had been left with him by the mother of his daughter.

55 The applicant has a criminal record which goes back to 2014. His prior convictions include theft, theft from a motor vehicle, theft of a motor vehicle, unlawful assault, criminal damage, knowingly uttering counterfeit money, attempting to obtain property by deception, obtaining property by deception, contravening a community correction order, failing to comply with a sentence order, reckless conduct endangering life, burglary, assaulting a police officer, assault with a weapon, handling stolen goods, possessing amphetamine, failing to answer bail, committing an indictable offence whilst on bail, contravening a conduct condition of bail, possessing a controlled weapon without lawful excuse and various driving offences.

56 At the time of his offending in 2020, the applicant was using around 2 grams of methylamphetamine per day as well as 30 to 40 milligrams of GHB.

Sentencing reasons

57 The judge commenced his reasons for sentence with a summary of the applicant's offending.[15] In the course of this summary, the judge said that the applicant's offending was explained by his need to finance his drug addiction and that, while this in part explained the offending, it did not excuse it.[16]

58 The judge said that the applicant had a 'reasonably lengthy criminal history from nine previous court appearances' and that in the past he had been 'afforded non-custodial dispositions by way of community correction orders' which had been breached.[17]

59 After summarising the applicant's offending, the judge said:

> As can be seen from this offending, which extended over a period of six months, it was somewhat prolific and frenetic. Your offending shows that you were prepared to steal almost anything of value to finance a drug habit. Theft of a motor vehicle itself is a serious offence, especially where the vehicle stolen is not recovered. As is burglary of residence. The charge of theft of three firearms which also have not been recovered is a serious example of what is a serious offence.
>
> Although much of your offending consists of low level thefts, this kind of offending causes trouble and anxiety amongst those members of the community who are directly affected by it. Credit cards have to be cancelled. Driving licences replaced et cetera. On one level much of your offending may be considered to be of nuisance value. But on another level, because this kind of offending is so prevalent, the community has become intolerant of it and expect the courts to impose sentences that reflect denunciation.
>
> In passing sentence I must have regard to the sentencing principles of deterrence (both general and specific), denunciation, protection of the public and just punishment. Further, because of the sheer number of offences I must have regard to totality. All these sentencing principles must be taken into account in arriving at an overall just and fair sentencing of you.[18]

It is the judge's reference to the prevalence of offending of the kind committed by the applicant in the middle paragraph of this extract which forms the basis for the complaint made by the applicant in proposed ground 2.

60 The judge observed that the applicant was arrested and charged on 23 December 2020 and that he had served 605 days in custody on remand by way of pre-sentence detention. As the judge observed, this was all served during the COVID-19 pandemic, which resulted in prison being more onerous and burdensome than would normally be the case.[19] His Honour also accepted that the further period of imprisonment which the applicant would be required to serve because of the sentence about to be imposed would also likely be served during COVID-19 restrictions.[20]

15 *DPP v Burke* [2023] VCC 1355, [1]–[49] ('Reasons').
16 Ibid [13].
17 Ibid [14].
18 Ibid [50]–[52].
19 Ibid [53].
20 Ibid.

61 The judge set out the procedural history of the matter, noting that there had been four committal case conferences and that, save for six charges, the matter resolved on 4 November 2021. His Honour then observed that all charges finally resolved on 11 March 2022, and the applicant was arraigned and pleaded guilty on 30 March 2022.[21]

62 The judge said that the applicant's plea of guilty to the charges was very much to the applicant's credit. His Honour said that, although the applicant did not plead guilty at the earliest opportunity, he nevertheless treated him as having pleaded guilty 'at an early time'.[22]

63 In relation to the applicant's pleas of guilty and the issue of delay, the judge said:

> By pleading guilty you have saved the time and cost of a trial and summary hearings.
>
> Further, your pleas of guilty to the charges are especially important in the present environment where this court is faced with a considerable backlog in criminal trials because of the COVID-19 pandemic. By pleading guilty you have not contributed to that backlog and you are entitled to a significant reduction in sentence for having done so. See *R v Worboyes* [2021] VSCA 169 recently reinforced by the joint judgement of Justices of Appeal Priest and Forrest in *Barnard (a pseudonym) v R* [2022] VSCA 42 at [18].
>
> By pleading guilty to the charges, you have accepted responsibility for your offending and you have advanced the administration of justice. For that you are entitled to, and will receive, a reduction in sentence and this will be reflected in the overall sentence that I will soon impose. Your pleas of guilty also signify remorse for this offending which I have taken into account.
>
> Your counsel submitted there should be a reduction in sentence because of delay. In all the circumstances of this case I reject that submission.[23]

It is the last sentence of this extract which forms the basis of the complaint made by the applicant in proposed ground 1.

64 After referring to the applicant's plea counsel's submissions acknowledging that a total effective sentence and non-parole period was required in this case, the judge summarised the applicant's personal circumstances.[24] While the judge said that he had been told that the applicant had admitted himself into a hospital in October 2020 due to experiencing suicidal ideation and thoughts of self-harm, the judge observed that there was 'no documentary evidence of this'.[25] The judge did, however, accept that the applicant had remained drug-free while on remand.[26] The judge said that, because the applicant was a long-term drug user, his prospects for rehabilitation were 'at best guarded'.[27]

65 Finally, the judge referred to the character references which had been tendered on behalf of

21 Ibid [54].
22 Ibid [55].
23 Ibid [55]–[58].
24 Ibid [60]–[68].
25 Ibid [66].
26 Ibid [67].
27 Ibid [68].

the applicant during the course of the plea.[28]

Applicant's submissions

66 Under proposed ground 1, the applicant noted that sentencing occurred more than two years after the commission of charge 1, and more than a year and a half after the commission of charge 53. He also observed that, on the plea, his counsel had relied upon delay as a relevant sentencing consideration, 'particularly due to the fact that the applicant had been kept in suspense for a lengthy period as to the sentence he would ultimately receive'. The applicant submitted that, in all the circumstances, delay was a factor which should have attracted at least some weight in assessing the appropriate sentence. The applicant then submitted that the sentencing judge's rejection of his counsel's submission that there should be a reduction in sentence because of delay[29] demonstrated that the judge erred in giving no weight to the fact that the applicant had been kept in suspense as to the sentence he would receive.

67 Under proposed ground 2, the applicant submitted that what the judge said at the end of Reasons [51] revealed that a lengthier sentence was imposed on him due to the 'prevalence' of 'this kind of offending'. That is, his Honour gave greater weight to denunciation of the offending due to his finding of prevalence. The applicant submitted that, in so doing, his Honour made two errors: first, he made a finding as to prevalence without any 'reliable foundation';[30] and secondly, in failing to raise (during the course of the plea hearing) the issue of prevalence, and any increased need for denunciation caused by prevalence, his Honour denied the applicant procedural fairness.[31]

68 Under proposed ground 3, the applicant submitted that, given the number of charges involved in the sentencing exercise, totality was a very significant sentencing consideration. Despite the importance of totality, the total effective sentence imposed was more than three and a half times as long as the base sentence. The applicant submitted that this 'strongly points to insufficient weight having been given to totality'.

69 The applicant submitted that the failure to give sufficient weight to the principle of totality has resulted in the imposition of a total effective sentence which is wholly disproportionate to the applicant's offending. The applicant observed that, while his offending was 'somewhat prolific and frenetic',[32] it concerned mostly 'low-level' offences.

70 The applicant submitted that, in addition to the issue of totality, the total effective sentence and non-parole period could be seen to be manifestly excessive in light of the following:

(1) Notwithstanding the complex procedural history relating to the resolution of the charges, the applicant was sentenced on the basis that he had pleaded guilty at an early time. The pleas of guilty indicated the applicant's acceptance of his responsibility for the offending and his remorse, and advanced the administration of justice in the context of the COVID-19 pandemic. The number of charges on the indictment were such that the pleas of guilty had a very significant utilitarian benefit in saving court time.

(2) The applicant was a 'relatively youthful offender', who was 25 at the time of the

28 Ibid [69]–[70].
29 Ibid [58].
30 See *Nguyen v The Queen* (2011) 31 VR 673, 694 [82].
31 Ibid.
32 Reasons, [50].

offending and 27 at the time of sentencing.

(3) The applicant's offending was explained (albeit not excused) by his drug use and his need to fund that drug use. The applicant used drugs 'as a form of self-medication to assist [him] with all the stresses [he was] then under'.[33] Moreover, the applicant had remained drug-free while in custody on remand.

(4) While the applicant's prospects of rehabilitation were assessed by the judge as 'at best guarded', the applicant had expressed his determination to remain drug-free so that he could be reunited with his daughter.

(5) While the applicant had a reasonably lengthy criminal history and had also breached non-custodial orders in the past, 'this was his first time in adult custody'.

Merits of the proposed application for leave to appeal

71 The applicant's proposed application for leave to appeal is devoid of merit. First, we are not persuaded that any of the applicant's proposed grounds of appeal are reasonably arguable. Secondly, even if there was any merit in any of the applicant's submissions that there is an error in the sentence imposed, there is no reasonable prospect that this Court would reduce the total effective sentence, or impose a less severe non-parole period than the one imposed by the judge.[34]

72 A major premise underlying the applicant's argument that the sentence is manifestly excessive is an assertion that his offending 'largely consisted of low level thefts'. While the vast majority of charges, by number, can be described as low level thefts, it is not correct to dismiss the seriousness of the applicant's offending by saying that it 'largely consisted' of those types of thefts. Significantly, the applicant's offending also consisted of the following serious offences:

(1) Charge 25 (theft of firearms), which occurred during the course of charge 24 (burglary) was a serious example of a serious offence. It was a rolled up charge relating to three firearms — stolen after the applicant broke through a plaster wall to gain access to a safe. The firearms have not been recovered. As has been said before by this Court, of particular concern in relation to the theft of firearms is the fact that these thefts can increase the illegitimate flow of firearms in the community and lead to very serious criminal activity.[35] Charge 25 attracted a sentence of 18 months' imprisonment (the base sentence).

(2) Charge 53 (aggravated offence of recklessly exposing an emergency worker to risk by driving) was a rolled up charge. The applicant twice rammed a police vehicle, and thereby put two police officers at risk. The second ramming occurred after the applicant had driven around police vehicles, and at a time when he could have driven away without putting any emergency workers at further risk. Charge 53 was also a serious example of a serious offence. It attracted a sentence of 12 months' imprisonment, with 12 months cumulation.

(3) Charges 40 and 44 (attempting to obtain a financial advantage by deception) were serious examples of serious offences, the amounts involved being $49,000 and

33 Ibid [65].

34 See s 280(1) of the *Criminal Procedure Act 2009*.

35 *Benkic v The Queen* [2019] VSCA 34, [18]; *Barry v The Queen* [2022] VSCA 94, [16].

$20,000 respectively. Each of these offences attracted a sentence of 12 months' imprisonment, with 6 months cumulation.

(4) Charge 6 (theft) was one of the nine thefts of a motor vehicle committed by the applicant. The vehicle the subject of that theft (a 1995 Jaguar XF sedan) was never recovered. Charge 6 was, on any view, a serious example of a serious offence. It attracted a sentence of 12 months' imprisonment, with 6 months cumulation.

73 In our opinion the sentence of 18 months on charge 25 was modest, being 10 per cent of the maximum penalty for that offence, bearing in mind that the offending involved the theft of three firearms which are now circulating in the community. And the sentence of 12 months on charge 53 was extremely modest.[36] Thus, even if one limited the consideration of the total effective sentence and non-parole period imposed by his Honour merely to the offences referred to in the previous paragraph, it is difficult to see how it could sensibly be suggested that any lesser total effective sentence or non-parole period could have been imposed. That becomes even more apparent when one factors in the balance of the applicant's offending, namely some 48 other indictable offences committed in a period of around six months.

74 In our opinion, the total effective sentence and non-parole period fixed by the judge can only be explained by the application of the principles of totality and proportionality — exemplified by the fact that on 44 of the 53 charges of the indictment, and in relation to 18 of the 19 summary offences, no order for cumulation was made. This occurred in circumstances where s 16(3C) of the *Sentencing Act* required every term of imprisonment imposed for an offence committed while the applicant was on bail (which encompassed all of the offending committed after 16 September 2020) to be served cumulatively unless the court otherwise directed.[37]

75 In light of the above, even if there had been some error in the judge's sentence, there is no reasonable prospect that this Court would reduce the total effective sentence, or impose a less severe non-parole period than the one imposed by the judge.

Conclusion

76 The applicant's proposed application for leave to appeal having no prospect of success, it would be futile to grant him the extension of time he seeks. Accordingly, the applicant's application for an extension of time for the filing of an application for leave to appeal against sentence will be refused.

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[36] Compare the sentences of 3 years' imprisonment imposed for the same offence in *Nelson v The Queen* [2020] VSCA 219 and *Hutchison v The Queen* (2021) 64 VR 450 (although it may be noted that in the latter case an emergency worker was in fact injured by the conduct).

[37] See also s 16(3D) of the *Sentencing Act* which required the term of imprisonment imposed on charge 53 to be served cumulatively unless otherwise directed by the court.